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No. 83-1528

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN LANE, PETITIONER

v.

ARKANSAS VALLEY PUBLISHING CO.,
MERLE BARANCZYK and ED QUILLEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

This is a libel action brought by a Colorado politician against a local publisher and its editorial staff, based on editorials and satirical writings criticizing the politician's performance of official duty. The plaintiff completed discovery of defendants and their sources of information. Defendants thereupon moved for summary judgment, which the trial court granted. The Colorado Court of Appeals affirmed. It concluded that plaintiff had not made a *prima facie* showing that, as a matter of fact, the challenged materials were false, or that, as a matter of state law, they were anything other than privileged opinions. In addition, the Court of Appeals affirmed the trial judge's finding that plaintiff had not raised a material factual issue concerning malice or reckless conduct, and that defendants had both acted reasonably and conducted an adequate investigation before publishing the challenged materials. The questions presented are as follows:

1. Whether the Court of Appeals correctly applied Colorado Rule of Civil Procedure 56(c) and the Colorado Supreme Court's decision in *DiLeo* v. *Koltnow*, 613 P.2d 318 (1980), when it affirmed the grant of summary judgment based on plaintiff's failure to raise a *prima facie* factual issue requiring trial.

2. Whether the Court of Appeals correctly applied the decision of the Colorado Supreme Court in *Burns* v. *McGraw-Hill Broadcasting Co.*, 659 P.2d 1351 (1983), when it concluded that, based on the text and context of the challenged publications, the publications constituted opinions that are privileged under state law.

STATEMENT PURSUANT TO RULE 28.1

Respondent Arkansas Valley Publishing Co. has no parent company, subsidiaries or affiliates.

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OPINION BELOW

The opinion of the Court of Appeals of the State of Colorado (Pet. App. 10a-19a) is reported at 675 P.2d 747 (Colo. App. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1983. On December 19, 1983, the Supreme Court of the State of Colorado denied a petition for certiorari (Pet. App.

20a-21a). The petition for a writ of certiorari was filed in this Court on March 15, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATEMENT

1. Petitioner John Lane ("plaintiff") sued respondents Merle Baranczyk, Ed Quillen, and Arkansas Valley Publishing Co. ("defendants") for compensatory and punitive damages which allegedly resulted from publication of eleven editorials and opinion columns. These were published over a period of approximately ten months in *The Mountain Mail,* a small intermountain newspaper published five days per week in Salida, Chaffee County, Colorado. In these publications, defendants commented upon plaintiff's performance as an elected county commissioner.

Plaintiff took office as county commissioner in November 1978. During the summer of 1979, plaintiff became the subject of a campaign to recall him from office, initiated and sponsored by a group of county employees. Plaintiff was removed from office in a recall election held in March 1980.

During 1979 and until the election in 1980, defendants published news articles which provided complete coverage of all significant events and issues that arose during plaintiff's tenure (R. Part I, p. 43), including each weekly meeting of the county commissioners and all of the issues which arose during the recall process *(ibid.)*.[1] Within this period of time, at least 175 news articles were published concerning plaintiff, and the news coverage so presented was balanced, factual, and objective (*id.* at p. 44). Not one of these articles was challenged in plaintiff's libel action.

[1] Beginning in July 1979, defendants permitted plaintiff to publish in *The Mountain Mail* his own column setting forth his views concerning pending and potential issues facing the county commissioners (R. Part I, p. 44; see, *e.g.*, Exhibits I-5, L-1, and N-1) ("R." refers to the record in the trial court).

The opinion columns challenged in plaintiff's libel action included satirical writings by defendant Quillen, which reflected a style and technique which he used frequently. In the first of these writings (Pet. App. 22a-24a), the author presented the text of an obviously fictional letter purportedly written by plaintiff to county employees concerning a new personnel code which had been introduced by plaintiff and adopted by the county. The letter humorously referred to the code as a new "command structure," and also referred to one of plaintiff's fellow commissioners, who had retired from the Navy, as "Admiral Welker." The letter purported to advise county employees that henceforth "your daily routine . . . will begin with roll call at 0600 hours and end with taps at 2200 hours," and that:

> "this code is not as harsh as the rumors have had it. Violations will be handled at lower levels with company- and field-grade Article 15 proceedings, and only in severe or flagrant cases will a court-martial be necessary."

The letter was signed "John Lane, Supreme Commander." Through this fanciful and satirical device, Quillen poked fun at plaintiff's well known military background.

The other satirical writings involved fictitious dialogues between defendant Quillen and "Ananias Ziegler," an imaginary character who was described as a "new county employee" retained by plaintiff and another commissioner to improve their public images (Pet. App. 32a-44a). Quillen stated that he found Ziegler's job so "interesting" that he decided "[he] would share the conversation with both readers of this column," and then set forth a purported transcript of the discussion. Ziegler described himself as a former Air Force public information officer who was "in charge of inflating body counts [during the Vietnam war], sending out home town press releases, and making sure the commanding officer looked good." Ziegler also suggested, as indicated by his name, that he was a former Press Secretary with the Nixon White House.

In a series of absurd exchanges, Ziegler discussed with Quillen his strategy for improving plaintiff's image and defeating the recall (Pet. App. 33a):

> "Quillen: What's your strategy going to be on the recall drive?
>
> Ziegler: Oh, pretty simple. First, I'll tell them to pretend like it isn't happening, that it doesn't exist.
>
> Quillen: And then?
>
> Ziegler: Well, then they'll make the usual statements that it represents only a small group of disgruntled radicals who do not represent the feelings of the hard working, decent and law-abiding people of the community."

These satires showed on their face that they were whimsical pieces, some stating expressly that they were an "imaginary figment," written by a "hard working satirist" who covered a "meeting of the un-persons," and who interviewed the improbable deep throat named "Ananias Ziegler" (Pet. App. 38a-44a).

These satirical columns, like all the other publications involved in this case, made reference to actual controversies under discussion in the county. Like the other publications, the opinions so expressed were based upon facts which were accurately stated or implied in the columns, or which were the subject of contemporaneous news reporting and public discussion that provided the assumed facts which formed the basis of the opinions.[2]

2. On April 29, 1981, defendants moved the trial judge for summary judgment in their favor. In the alternative, defendants requested a partial adjudication determining which, if

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[2] As one typical example, Ziegler referred (Pet. App. 34a) to intense public controversies concerning the commissioner's recent contracts and hirings, the facts of which were truthfully and prominently reported in local news coverage. These included a dog control officer, who was hired after she

(footnote continued)

any, of the allegedly defamatory statements constituted "actionable statements of fact" (R. Part I, p. 15). That motion was supported by a voluminous discovery record and affidavits. Defendants also filed a brief which contained an exhaustive analysis of the record, with citations to the depositions, affidavits, and exhibits, all of which demonstrated that each challenged statement "was an opinion with a factual basis" (Pet. App. 11a). The moving papers focused upon undisputed facts which demonstrated the following as to the factual basis and context of the challenged editorials and opinion columns:

First, all of the editorials at issue were preceded or accompanied by news articles which reported the facts underlying the issues discussed in the editorials. Those articles all were submitted as exhibits (R. Part V, Exhibits I-1 through V-22).

Second, the facts stated in the articles were reported accurately (R. Part V, affidavit, ¶ 3). This, together with deposition testimony, established that the material facts recited in, referred to, or otherwise indicated by the editorials and opinion columns were true (R. Vol. I, pp. 30-42).

(footnote continues)

had worked with the commissioners on the drafting of her own proposal for county animal control (Exhibit Q-3; R. Part II, 249-251), a computer programmer who was promised a contract in the event the county purchased a computer (Exhibit L-3; R. Part II, 247-249), and a maintenance inspector (a retired Air Force officer) who also was hired under a negotiated contract (again without soliciting applications from the public) (Exhibits N-2, N-3, R. Part II, 251-253). The latter two incidents involved special contracts which departed from procedures prescribed by the commissioners (including public advertising of the positions and selection among applicants by a hiring board) and negotiations which occurred in private sessions. At the time the columns were published, the most controversial issue debated in the county was the hiring and subsequent promotion to the position of county road supervisor—at a salary out of proportion to that of other county employees—of an individual who recently had retired from a local mining company (R. Part II, 258, 365). These decisions were made in private meetings without public notice or comment, and in the face of intense opposition (Exhibits N-4, N-5, N-6, N-7, and N-8).

Third, prior to the publication of the satirical columns written by defendant Quillen (Pet. App. 22a-24a, 32a-44a), Quillen had established in the community a recognized pattern of using that satirical style of writing (Exhibits V-1 through V-22).

Fourth, throughout plaintiff's tenure as county commissioner, his conduct in office inspired intense political controversy and harsh debate in which colorful, vitriolic rhetoric frequently was utilized (Exhibits I through U). This was reflected not only in the opinion columns of defendants, but also in guest columns, letters to the editor for which *The Mountain Mail* provided an open forum, and reports of debates at commissioners' meetings (*e.g.*, Exhibits U-4 through U-7, U-12, U-14, U-28, U-29, and U-32).

On June 9, 1981, plaintiff served papers in opposition to defendants' motion for summary judgment in which, as the court of appeals explained, he ". . . did not refute the factual basis" for the editorials as established by defendants (Pet. App. 12a). Moreover, at the hearing held on July 13, 1981 on the motion for summary judgment, defendants "addressed each article and demonstrated that the facts contained therein had been the subject of prior news articles, the truth of which was not disputed" (*ibid.*).

After argument, the trial court asked whether it would be necessary to review depositions. Counsel for plaintiff responded "[m]y understanding [is] . . . that we are going to get into malice and the factual issues at a later time" (Tr. 60); he added that "what we are presenting here today, as I understand it, is the issue of fact versus opinion and whether the matters alleged are [def]amatory" (*id.* at 61). Counsel for defendants replied that it *would be necessary* for the court to review the depositions with respect to matters "cited in my brief and yours too for that matter" (*id.* at 60; see also Pet. App. 63a).

On September 23, 1981, the trial court granted defendants' motion for summary judgment. The trial judge expressly made the following findings and conclusions (Pet. App. 6a-8a): (1) that plaintiff is a "public figure;" (2) that the humorous publications were "obvious satire," much of which was supported by fact and the rest was "rhetorical hyperbole" typical of political campaigns; (3) that these publications fell into the category of protected "opinions" under Colorado law; (4) that plaintiff failed to present any evidence, even circumstantial evidence, that defendants acted with malice or with reckless disregard for the truth; (5) that all of the record materials showed that defendants "conducted a reasonable investigation of facts from reliable sources prior to publication" to confirm the truthfulness of their factual information; and (6) that plaintiff failed to raise any "genuine issue" of fact, as required under Colorado Rule of Civil Procedure 56(c), which would preclude summary judgment.

After announcing his decision, the trial judge offered to further hear the issues if plaintiff so desired. Plaintiff elected not to do so and appealed. Plaintiff has never attempted to show in the trial court, the Court of Appeals, the Colorado Supreme Court, or this Court, that he possesses or could offer any material evidence not already contained in the record.

3. On May 5, 1983, the Court of Appeals affirmed the judgment of the trial court (Pet. App. 10a-19a). With respect to plaintiff's attempt to limit the issues at the summary judgment hearing, the Court noted (Pet. App. 13a): "Both parties' trial court briefs addressed the full range of issues." The Court of Appeals also explained (*ibid.*) that:

> "the matters before the court were sufficient to inform it whether the articles implied the assertion of undisclosed facts and, where there was an issue as to truth or falsity of those facts, whether defendants acted with reckless disregard of whether they were false or not."

Applying a Colorado Supreme Court decision construing state law, the Court of Appeals held that the trial court "did not err in basing its ruling on the briefs and supporting materials in the court's file." *Ibid.*

With respect to the "opinion" issue, the Court of Appeals held as a matter of state law that the satirical writings and most of the editorials contained mere statements of opinion, and that the facts upon which the opinions were based were fully disclosed and not distorted or misrepresented. Applying past Colorado cases, the Court concluded that, in context, the opinions reflected merely the "fiery rhetoric" and "hyperbole" typical of hotly contested political campaigns and were not actionable under Colorado law (Pet. App. 17a-18a).

With respect to the editorials which contained factual assertions, the Court of Appeals agreed with the trial judge that plaintiff had failed to raise a "genuine issue of fact" or a "prima facie case" which would survive a motion for summary judgment. The court observed that the contested assertions were factually correct and that defendants had made an unrebutted demonstration that they undertook a "reasonable investigation" before publishing the articles (Pet. App. 18a). Applying the controlling decision of the Colorado Supreme Court in *DiLeo* v. *Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980), the Court of Appeals ruled that plaintiff was not entitled to rest on bare allegations in his complaint in face of specific factual proof of truthfulness and reasonable care. Hence, it was the burden of plaintiff to come forward with specific evidence that would necessitate a trial—a burden which he failed to sustain.

4. On December 19, 1983, the Colorado Supreme Court denied plaintiff's petition for a writ of certiorari (Pet. App. 20a-21a).

REASONS FOR DENYING THE PETITION

I.

As his first ground for granting the petition (Pet. 4-6), plaintiff contends that he was denied due process of law under the Fourteenth Amendment by not being given adequate notice and an opportunity to be heard in connection with the determination of the issues of truth and malice. However, his characterization of the decision-making process is not supported by the record.

Plaintiff had ample notice and opportunity to be heard on the issues determined by the trial court and the Court of Appeals. Defendants' motion for summary judgment and supporting papers established that the facts which were stated in, referred to, or otherwise indicated by the challenged publications were all true. In addition, defendants' exhibits established the context of the publications. Plaintiff did not attempt to controvert any of the facts so established, as required by Colorado Rule of Civil Procedure 56(e). Plaintiff now declares that he was led to believe that the trial court would not consider factual matters outside of the pleadings in ruling upon the motion. There is no merit to this contention.

Defendants' moving papers painstakingly established numerous facts extraneous to the pleadings. Defendants' purpose in establishing these matters was readily apparent. To demonstrate the absence of "actionable statements of fact," it was necessary to show the context of the publications and the truth of the facts stated, referred to, or assumed as the basis for the opinions expressed. Yet, plaintiff totally ignored these matters until the date of the summary judgment hearing.[3]

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[3] Plaintiff focuses upon language in defendants' motion which requested "a favorable determination of this litigation on the grounds that the statements complained of as libel are constitutionally privileged as opinion and political rhetoric" (Pet. 5). However, defendants' accompanying summary

(footnote continued)

At the July 13 hearing, plaintiff attempted to limit defendants' motion to legal issues framed by the pleadings. However, defense counsel unequivocally stated that all of the factual matters cited in the briefs must be considered in support of the motion.

While it is true that the parties expected to address the issue of "malice" in greater detail in separate briefs at a later time, this did not limit the discretion of the trial judge to reach all of the issues raised by the record before him. As the Court of Appeals explained (Pet. App. 13a):

> "Both parties' trial court briefs addressed the full range of issues despite the limited scope of the hearing, and the court did not err in basing its ruling on the briefs and supporting materials in the court's file. In a different setting the Supreme Court stated:
>
> > 'Defendant urges that this question of law cannot be determined until the court is apprised of all the facts. However *on the facts submitted* if the question of law is capable of determination the decision should not be withheld because of a claim of other facts, not disclosed, which might result in a different determination .... It is apparent from the matters that were before the court that a different result would not have been obtained had the president of the company been called as a witness to testify on the issue .... *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961).' (emphasis in original).

(footnote continues)

judgment brief, which was incorporated in the motion, not only deals exhaustively with the issue of truth, but also raises the "actual malice" requirement in libel actions (Brief in Support of Summary Judgment, pp. 1, 3). Plaintiff's opposition brief also set forth his contentions on the issue of defendants' state of mind (Brief in Opposition to Summary Judgment, pp. 23-24).

> Here, the matters before the court were sufficient to inform it whether the articles implied the assertion of undisclosed facts and, where there was an issue as to truth or falsity of those facts, whether defendants acted with reckless disregard of whether they were false or not."

In the present case, the "matters before the court" included extensive depositions which plaintiff had taken of defendants and the persons upon whom defendants relied as sources for their publications.

After the decision of the trial court, plaintiff declined the opportunity to have the matter resubmitted or to tender additional evidence and argument. Moreover, plaintiff has never suggested what evidence might be adduced in addition to the evidence already in the record which would affect the determination of the malice issue.

Hence, even if plaintiff actually was surprised by the scope of the trial judge's ruling, the Court of Appeals correctly found that any error was harmless. The record not only demonstrated conclusively the absence of any reckless falsity, but also that discovery was so complete as to make it apparent that a different result would not have been reached if further briefing had been entertained.

II.

Plaintiff also urges (Pet. 6-8) that the procedure employed by Colorado courts in resolving motions for summary judgment is based upon a misapplication of the First Amendment. To the contrary, however, the procedure employed by the Colorado courts is based upon their own procedural rules and substantive standards which derive from Article II, Section 10 of the Constitution of Colorado.[4] Thus, the argument raised by plaintiff turns on state law, and no federal issue is presented.

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[4] The text of Article II, Section 10 of the Constitution of the State of Colorado appears in the Appendix to this brief.

The Colorado law of defamation is founded upon principles once embraced by three members of this Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), but since rejected by a majority in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The *Rosenbloom* plurality opinion would have extended the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to all matters of general concern, regardless of whether the plaintiff was a public official or public figure. The *Rosenbloom* opinion also stressed (403 U.S. at 55) the requirement that the evidence in such cases satisfy:

> "the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not."

In *Gertz*, this Court gave further consideration to the limitations on actions for defamation of private individuals as opposed to public officials or public figures. The Court held, *inter alia*, that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347. The Court's opinion leaves no room to doubt that the States are free to adopt standards providing for greater protection of the media than required by the First Amendment.

In *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975), *cert. denied*, 423 U.S. 1025 (1975), the Colorado Supreme Court prescribed the state law standards which would apply to libel actions by private individuals, as authorized by this Court in *Gertz*. The *Walker* court acknowledged that *Gertz* " appears to disapprove of the rule stated . . . in *Rosenbloom*," and "appears to favor a simple negligence standard in cases not involving a public official or public figure." 538 P.2d at 456. Nonetheless, on the basis of its own assessment of competing policy considerations, the Colorado

Supreme Court adopted the reasoning of the plurality opinion in *Rosenbloom*. 538 P.2d at 457. Significantly, the Court also adopted that aspect of the *Rosenbloom* plurality opinion which requires that, with respect to "First Amendment questions of constitutional fact," liability must be based on evidence of "convincing clarity." 538 P.2d at 459.

Thereafter, in 1980 the Colorado Supreme Court decided *DiLeo* v. *Koltnow*, 200 Colo. 119, 613 P.2d 318, the case which prescribed the summary judgment standard followed by the Court of Appeals in the instant case. *DiLeo* was a libel case brought by a public figure, which the trial court had dismissed under Colorado's summary judgment procedure for lack of proof of a knowing or reckless falsity. The Colorado Supreme Court affirmed, and explicated the standard to be applied by trial courts in ruling on summary judgment motions in libel cases. The court reaffirmed the requirement that "actual malice" be established with "convincing clarity" (613 P.2d at 323). The court then adopted the definition of "clear and convincing evidence" which had been developed in Colorado under common law. 613 P.2d at 323. The Court explained how this standard of proof was to be applied under Colorado Rule 56, which permits summary judgment only when there is no genuine issue of material fact (*ibid.*):

> "In ruling upon the presence of a genuine issue of fact as to the existence of actual malice the trial judge must decide whether: 'the plaintiff has offered evidence of a *sufficient quantum to establish a prima facie case*, and the offered evidence *can be equated with the standard or test of 'convincing clarity'*. . . ." (Emphasis in original).

Two years later, in *Diversified Management, Inc.* v. *The Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982), the Colorado Supreme Court reaffirmed the requirement of clear and convincing evidence. The Court rejected the argument that the Colorado General Assembly had overridden that standard of proof. In so ruling, the Court emphasized that the requirement

of proof with convincing clarity rested upon the Court's interpretation of Article II, Section 10 of the Constitution of Colorado (653 P.2d at 1109; emphasis supplied):

> "When we adopted the *Rosenbloom* standard in *Walker*, we held that 'liability must be supported with convincing clarity,' 188 Colo. at 101, 538 P.2d at 459, and in *DiLeo* v. *Koltnow, supra,* we equated 'convincing clarity' with 'clear and convincing.' That our decision in *Walker* was based upon constitutional concerns is apparent from the fact that we rejected a simple negligence rule, permitted under *Gertz,* because we felt it would cast a 'chilling effect upon the news media . . .' 188 Colo. at 99, 538 P.2d at 458. *Because our decision was based upon our interpretation of article II, section 10, of the Colorado Constitution, the clear and convincing standard established in Walker supersedes the statute."*

Together, these cases demonstrate that the *DiLeo* summary judgment standard applied by the Colorado Court of Appeals in the present case was derived directly from the Colorado Supreme Court's interpretation of the substantive requirements of the Colorado Constitution in defamation cases and Colorado's own procedural rule governing summary judgment motions (Colorado Rule of Civil Procedure 56). Both the substantive standard and the procedural rule were adopted in Colorado without compulsion emanating from the First Amendment.[5]

Plaintiff also argues that some state courts are granting summary judgment too freely in defamation cases. He places reliance upon a generalized dictum in *Hutchinson* v. *Proxmire,* 443 U.S. 111, 120 n.9 (1979) (Pet. 7-8). However, plaintiff is presenting his arguments to the wrong Court. The dictum in

[5] The substantive standards in question were developed in the context of actions brought by private individuals. Of course, nothing less than these standards would govern cases brought by public officials.

Hutchinson was addressed to federal courts applying the Federal Rules of Civil Procedure. This Court has no similar supervisory role with respect to the "diversity of standards" in state jurisdictions (Pet. 8). The states are free to develop summary judgment standards of their own pursuant to their own laws.[6] Applying its own constitution and rules of civil procedure, Colorado has chosen to do so with full awareness of the *Hutchinson* dictum.[7]

Finally, and most fundamentally, the result in this case does not depend upon any special approach to summary judgment in defamation cases. Although plaintiff asserts (Pet. 6) that the state court's decision will provide "complete immunity from liability for defamation," the simple fact is that the Court of Appeals rendered its decision on the ground that *plaintiff failed to present any evidence from which a finding of falsity or malice could be made.* There is nothing in that determination which warrants review by this Court. The deficiency in this case was a factual deficiency that would have been fatal in *any* court, state or federal, under *any* summary judgment standard. Even though malice is a "state of mind issue," there never is a need for a jury trial if the discovery record shows no falsity, a thorough and reasonable investigation, and no evidence of recklessness.

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[6] See, *e.g.*, *Karaduman* v. *Newsday, Inc.*, 51 N.Y.2d 531, 416 N.E.2d 557, 563 (N.Y. 1980): "[Q]uestions concerning the sufficiency of a party's submissions to defeat a motion for summary judgment are principally a matter of State procedural law, and the analysis which the Supreme Court may use in denying a motion for summary judgment under the Federal Rules of Civil Procedure may differ substantially from the analysis that we would use under our own procedural statutes." *Accord*, *Brophy* v. *Philadelphia Newspapers, Inc.*, 281 Pa. 588, 422 A.2d 625, 637 (Pa. 1980) (concurring opinion discussing summary judgment standards): "We are always able to permit greater freedom in this Commonwealth than do the federal courts."

[7] *DiLeo* was decided one year after *Hutchinson*, and *Hutchinson* was cited to the Colorado Supreme Court in the briefs filed by the parties. The Court gave full consideration to the issues reflected in the *Hutchinson* dictum. 613 P.2d at 322-323.

III.

As his final ground for granting the petition, plaintiff attacks the Court of Appeals' application of the opinion privilege (Pet. 8-13). Plaintiff attempts to frame the question in terms of whether this Court's decisions, as reflected by the *Restatement (Second) of Torts*, § 566 (1977), have eclipsed the common law fair comment privilege (Pet. 8). See also *Miskowsky* v. *Oklahoma Publishing Co., cert. denied*, 459 U.S. 923 (1982) (Rehnquist, J., dissenting), *reh'g. denied*, 459 U.S. 1059 (1982). However, the holding of the Colorado Court of Appeals goes no further than to apply principles recognized in Colorado under the common law doctrine of fair comment, and does not require further support from decisions of this Court or the American Law Institute revisions to the *Restatement of Torts*.

Under the traditional common law doctrine of fair comment, the privilege for an opinion is lost when the facts upon which it is based neither are set forth truthfully nor "otherwise known or available to the recipient as a member of the public." *Restatement of Torts*, § 606 (1938). The pertinent change wrought by the 1977 revisions to the *Restatement* is that the privilege for an opinion as such is never lost, and the communication is actionable only on the basis of the falsity and defamatory character of facts, if any, which are fairly stated or implied as the basis of the opinion. *Restatement (Second) of Torts*, § 566, comment f at 177 and § 581A, comment c at 236 (1977). *See* Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1227-1251 (1976).[8]

The Court of Appeals' decision rests upon an application of the traditional common law of fair comment as recognized before the *Restatement* revisions. The court specifically found

[8] The common law fair comment privilege also requires that comment concerning a public office holder concern his public conduct. *Restatement of Torts* § 607 (1938). That condition clearly is fulfilled in this case.

that defendants "demonstrate[d] that each [statement in issue] was an opinion with a factual basis" and that such factual basis "had been the subject of prior news articles, the truth of which was not disputed" (Pet. App. 11a-12a). As to the articles containing opinions, the court found that each either truthfully stated the factual basis for the opinion, or alluded to a factual controversy which was part of plaintiff's record as a public officer, which was reported accurately in contemporaneous news coverage, and which was based upon facts "available to the recipient[s] as . . . member[s] of the general public." *Restatement of Torts*, § 606; *Hill, supra*, 76 Colum. L. Rev. at 1231-1232.[9]

Plaintiff makes three separate arguments with respect to the opinion issue. First, he contends that the Court of Appeals improperly recognized a privilege to comment upon facts which already have been placed in the public domain by way of prior newspaper publicity and otherwise; second, that the Court of Appeals' holding recognizes, under the guise of the opinion privilege, that imputations of defamatory fact made during an election contest are absolutely privileged; and third, that the trial court erred in determining that the fiction and satire here at issue could not reasonably be perceived as a statement of fact.

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[9] Addressing the publications individually, the Court of Appeals found that the May 4, 1979 "Supreme Commander" letter was an opinion and that "the factual basis for the opinion is disclosed in the article" (Pet. App. 16a). As to the four "Ananias Ziegler" articles, the court found that to the extent that they could be understood as other than pure fiction and fantasy, the facts alluded to had "been the subject of news articles" the truth of which was not disputed (*id.* 17a). As to the editorials dated November 30, 1979 and February 15, 1980, the court found that the publications contained the facts upon which the comments were based, and that there was "no charge that the facts are false" (*id.* 17a-18a). Finally, the court found that while the balance of the editorials contained statements of fact, the defendants had "submitted excerpts from depositions and news articles demonstrating the factual basis for the editorials" and that plaintiff was "unable to show in response that the factual bases were false" (Pet. App. 18a).

Defendants will demonstrate that each of these arguments raises only issues of state law and that each of these arguments is devoid of merit.

A.

The Court of Appeals' opinion does not recognize any new privileges. The privilege to comment upon matters which already are in the public domain is well recognized under the common law of Colorado, and does not depend for its existence upon the First Amendment. Petitioner's suggestion (Pet. 8) that *Gertz* and the *Restatement (Second) of Torts*, § 566 (1976) have "expand[ed] the 'fair comment' privilege to protect defamatory statements of opinion based upon facts known or mutually assumed by the parties to a communication" is simply erroneous. At common law, an opinion is protected when it is based upon facts which—even if not stated by the speaker—are "available to the recipient as a member of the public." *Restatement of Torts*, § 606 (1938). *See* Hill, *Defamation and Privacy Under The First Amendment*, 76 Colum. L. Rev. 1205, 1231 (1976):

> "Even when the appellation is not accompanied by a statement of supporting fact, it may be understood as based upon a core fact that is public or available to the public, as in the case of the record of a holder of government office."

This contextual approach to determining the meaning and privileged character of published words was embraced by this Court in *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U.S. 6 (1970). State courts have adopted the same principle. See, *Hawkins* v. *Oden*, 459 A.2d 481 (R.I. 1983); *Pease* v. *Telegraph Publishing Co., Inc.*, 125 N.H. 62, 426 A.2d 463 (1981); *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336, 403 N.E.2d 376 (1980).

The facts underlying the controversies referred to in defendants' editorials were the subject of contemporaneous, truthful, and balanced news reporting in the community. Defendants' expressions of opinion were made with obvious reference to pending public controversies, the facts of which were in the public domain. As the Court of Appeals recognized, petitioner's conduct as a public official in general, and in relation to the particular controversies discussed, was fully open to public view. Members of the public thus had the means—either in person or through media reporting of the facts—to draw their own conclusions as to whether defendants' characterizations of plaintiff's conduct were reasonable.

Plaintiff siezes upon the language in the *Restatement (Second) of Torts*, § 566, which provides that an opinion based on unstated facts is privileged where the facts are "assumed to be true by both parties to the communication." *Id.* comment c. Petitioner would take this language, which obviously assumes a two-party conversation, and apply it out of context to a communication aimed at the general public. He would thus require anyone who wishes to enter into a debate on a public issue to precede his opinion with an elaborate recitation of supporting facts, or be able to prove that previously published facts concerning the matter had been read by each person who received his communication. Such a stringent standard of proof never has been required under the common law, which requires only that the facts be "available" to recipients of the communication. It would also be inconsistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); see also *Bose Corp.* v. *Consumers Union of United States, Inc.*, ____ U.S. ____, No. 82-1246 (April 30, 1984), slip op. 24-25, 27. Thus, the Court of Appeals was not required to adopt plaintiff's strained and unprecedented interpretation of Colorado common law.

B.

Plaintiff urges (Pet. 11) that the Court of Appeals improperly held that imputations of defamatory fact made during an election contest are entitled to an "absolute" privilege. To the contrary, however, the Court of Appeals simply adhered to the contextual approach—approved by the Colorado Supreme Court in *Burns* v. *McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351 (Colo. 1983)—which traditionally is used to determine what meaning a jury might reasonably attach to an allegedly defamatory publication (Pet. App. 14a-15a). In *Burns*, the Colorado Supreme Court affirmed a jury verdict for the wife and children of a policeman disabled in the line of duty, who had been libeled by a television documentary which reported the policeman's predicament and stated that he had been "deserted" by his wife and family. The defendant urged that the statement was mere opinion. In ruling upon the legal sufficiency of that defense, the *Burns* court emphasized that the "surrounding circumstances and factual context of any defamation action will determine whether a fact or an opinion has been published." 659 P.2d at 1359. The Court held the statement there involved to be actionable in context because it was "not supported by disclosed facts or circumstances which would allow an average listener to evaluate the purported opinion," and thus could be found by the jury to be a false and defamatory assertion of fact. 659 P.2d at 1360.

In applying *Burns*, the Court of Appeals in this case simply recognized the significant contextual difference between gratuitous comments concerning the merits of a private matrimonial dispute, made without indicating the factual basis therefor, and comments made during a heated political debate on issues which already had received extensive publicity and as to which the facts already were before the public. This contextual analysis raises no novel questions. The Court of Appeals' approach to the issue at hand has long been recognized by this

Court as a constitutional matter, *Greenbelt Cooperative Publishing Assn.* v. *Bresler,* 398 U.S. 6 (1970), and by other courts applying state common law. *Restatement of Torts* § 614, comment c; *Meyers* v. *Boston Magazine Co., Inc.,* 380 Mass. 336, 403 N.E.2d 376 (1980); *Yorty* v. *Chandler,* 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970).

C.

Plaintiff's third and final attack upon the Colorado Court of Appeals' application of the opinion privilege focuses upon satirical writings published in the opinion column of defendant Ed Quillen in a style which he frequently utilized. In these columns, Quillen employed the satirical devices of fictitious letters and dialogues, akin to those made popular by columnists such as Art Buchwald and Mike Royko. As plaintiff's expert on journalism correctly noted (Pet. 12), these pieces were not labeled "fiction" (Pet. App. 60a). However, they involved such clearly fictitious characters and absurd exchanges of dialogue that no reasonable person, giving them reasonable reflection, could possibly understand them literally or factually.

Plaintiff alleged that the "Supreme Commander Letter" was understood as a real letter, and that he was falsely depicted as an anti-democratic militarist. He also alleged that the Ziegler columns were understood as depicting a real person actually hired by plaintiff, for his own benefit, which would amount to a misuse of county funds. The Court of Appeals concluded, as a matter of Colorado law, that the publications were not reasonably capable of being so understood. Again, using the contextual analysis of *Burns* and similar cases, the Court examined the columns and the surrounding circumstances and concluded that it would be grossly unreasonable for any reader to construe them as asserting a defamatory fact.[10]

[10] The satirical and fictitious "context" of these publications is indeed "obvious," as found by the trial court (Pet. App. 7a). The speakers made a wide variety of ridiculous assertions such as Ziegler's statement that he was a

(footnote continued)

This determination was in keeping with the traditional role of a court under the common law, which must make a threshold legal determination whether a publication is reasonably capable of bearing the meaning which the plaintiff attributes to it. *Restatements (Second) of Torts* § 566, comment c at 173 (1977); *Restatement (Second) of Torts* § 614, comment c at 312 (1977); *Meyers* v. *Boston Magazine Co., Inc.*, 403 N.E.2d at 378-379.

Plaintiff offered affidavits of several persons who said that they did not perceive the satirical import of these columns at first reading. However, those affiants also stated that through conversations with other citizens in the community, they soon realized that the depiction was a "put on." Indeed, plaintiff admitted that there was no one in the county who did not know the fictional nature of this and the other satirical columns as of the time of his deposition in February 1980 (R. Part II, 275-276), a deposition which was taken one month prior to the recall election. The fact that a few people initially reacted to the publications in a clearly unreasonable manner has no bearing upon the trial court's threshold legal determination as to the manner in which the publications reasonably could be understood—a determination which always has been authorized by the common law of libel.

This case presents no occasion for this Court to consider the contours of the constitutional privilege which plaintiff says "sprang from the ear of *Gertz* v. *Robert Welch, Inc.*" (Pet. 13). Each of plaintiff's objections to the ruling of the Colorado Court of Appeals on the opinion issue involves legal principles established under the common law prior and without regard to this Court's decisions under the First Amendment.

(footnote continues)

"body count" inflator during the Vietnam war (Pet. App. 17a, 32a-33a). The depictions are, in the words of the certiorari petition, "moronic and absurd" (Pet. 2). The lower courts were within their province when they concluded that, as a matter of state law, these fantastic colloquies were obviously imaginary satires.

Moreover, this case does not even arguably involve the "outer limits of the opinion privilege" (Pet. 13). It involves the very core. If publishers cannot ridicule public officials, believed to be incompetent and unresponsive, by writing articles which, on their face, are tongue-in-cheek satires, then the scope of the opinion and fair comment privilege would be reduced to nothing. In a democratic society, it is the very purpose of the press to criticize public officials who do not perform their duty. Politicians dissatisfied with their performance at the ballot box have no right to receive a rich harvest of damages from editorial writers who have successfully highlighted their official failings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Appendix

Article II, Section 10 of the Constitution of the State of Colorado provides as follows:

> "*Freedom of speech and press.* No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."